United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL **75-7649**

United States Court of Appeals

For the Second Circuit

B P/S 3-19

MARVIN STERN,

Plaintiff-Appellee and Cross-Appellant,

against

SATRA CORPORATION and SATRA CONSULTANT CORPORATION,

Defendants-Appellants and Cross-Appellees.

Appeal from a Judgment of the United States District Court for the Southern District of New York

BRIEF OF DEFENDANTS-APPELLANTS SATRA CORPORATION AND SATRA CONSULTANT CORPORATION IN REPLY TO THE RESPONDING BRIEF OF PLAINTIFF-APPELLEE MARVIN STERN, AND IN RESPONSE TO STERN'S CROSS-APPEAL

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Preliminary Statement

Defendants-appellants and cross-appellees, Satra Corporation and Satra Consultant Corporation ("Satra"*), jointly submit this brief in reply to the responding brief of plaintiff-appellee and cross-appellant Marvin Stern ("Brief"), and in response to the issues raised in Stern's Brief as part of his cross-appeal. Points I, II and III herein relate to the issues in Satra's appeal; Points IV and V respond to Stern's cross-appeal.

* Except where otherwise noted, definitions, abbreviations and references to the record are in the same form as in Satra's Main Brief.

Introduction

No amount of factual distortion or misstatement of the record can hide the basic message of Stern's Brief, coming through loud and clear. Incredible as it may seem, Stern contends that (a) he made no misrepresentations to Satra as to his influence with IBM or as to the necessity of his future services to a successful Satra-IBM relationship, and yet (b) Satra, with its acknowledged expertise in the field of Soviet-American trade, purportedly agreed to give Stern 50% of potentially millions of dollars for little, if any, time to be devoted by Stern for future services rendered. Stern is saying, in essence, that he is entitled to a perpetual 50% of revenues from all future Satra-IBM consulting agreements in return for little or no future services rendered.

Far be it from Stern to seek only half a loaf, Stern also claims that his equal partnership, joint venture agreement with Satra, although designed to allow Satra to be reimbursed for expenses, provides that (a) Satra is not to be reimbursed for the hundreds of thousands of dollars of expenses it incurred to service the 1971 IBM Agreement, and (b) Stern is to receive one-half of *all* moneys owed by IBM to Satra under the 1973 IBM Agreement without any deductions for expenses, leaving Satra similarly unreimbursed for *all* expenses incurred to service that agreement.

Indeed, Stern's avariciousness is made clear by his Brief, for he changes with chameleon-like quality from the lily-white of innocence to the green of U.S. currency as his claims reveal themselves to be more and more implausible.

ARGUMENT

POINT I

The District Court's Confusing Instructions to the Jury on the New York Law of Rescission Constitute Prejudicial Error and Require a Reversal of the Judgment.

Stern does not disagree that the law of New York permits a party to rescind a contract induced by misrepresentations, even though they were not fraudulently made, *i.e.*, without an intent to deceive. He similarly does not disagree that the District Court failed to specifically instruct the jury on this point of law. Succinctly stated, Stern claims that the failure to so instruct the jury is not reversible error because (a) the charge as a whole was fair and accurate, and (b) the charge requested by Satra, even if given, would not have changed the jury's ultimate verdict.

A. Failure to Instruct a Jury on the Law of Innocent Misrepresentation Constitutes Reversible Error.

Proof of fraud was posed to the jury as a critical element of Satra's defense (Satra's Main Brief, pp. 14-19). The jury was not given the alternative, as the law requires, of finding for Satra even if it found that Stern did not have an intent to deceive when he made the misrepresentations in question. Where critical issues to a party's claim or defense, such as intent to deceive, are not clearly or properly submitted to a jury, reversible error has been committed. *NMS Industries, Inc.* v. *Premium Corporation of America, Inc.*, 451 F.2d 542 (5th Cir. 1971); *Allstate Insurance Company* v. *Winnemore*, 413 F.2d 858 (5th Cir. 1969); *A.B.C. Needlecraft Co.* v. *Dun & Bradstreet, Inc.*, 245 F.2d 775 (2d Cir. 1957).

In *Allstate Insurance Company* v. *Winnemore*, *supra*, the Fifth Circuit found prejudicial and reversible error

in the District Court's failure to instruct the jury that innocent misrepresentation was a sufficient ground to rescind a contract.

> "The Court's charge is clearly susceptible to the interpretation that an applicant for insurance must *fraudulently* give an incorrect answer before the insurance company is entitled to rescission. . . . The trial court may charge the jury in any fashion it elects, *so long as it is made clear that an incorrect answer, even innocently made, will vitiate the policy if it is material to the risk.* The jury must not be left with the impression that the applicant must deliberately falsify or misrepresent before the insurance contract may be rescinded."
>
> * * *
>
> *"We conclude that the jury may well have been misled into thinking that it needed to find a knowing misrepresentation . . . in order to rule for [defendant]. The instructions were prejudicial . . . and require reversal."* (First emphasis in original, remaining emphasis added.) *Id.* at 862.

Perhaps the best indication that the jury was confused and misled on the relationship between Stern's state of mind and Satra's defense of rescission is the colloquy betweeen the District Court and jury after the main charge was completed:

> "JUROR No. 5: Another thing that I am a little confused on is this: In terms of misrepresenting the facts as opposed to misrepresenting opinion, if I allege that this bannister is over six feet tall, I am misrepresenting a fact. If I allege that it is the best bannister I have ever seen, is that misrepresenting a fact or an opinion or—
>
> [THE COURT]: I don't think that it would be proper for me to try to specify for you an example there. . . . *I believe that you understand . . . the difference between deliberately telling somebody an untruth or*

merely expressing an opinion which you don't believe —how can I put it?—in which there is no deliberate intention to misrepresent.'' (Emphasis added.) (915-16A)

An objective reading of this comment can lead to only one conclusion—that the jury was actually instructed that innocent misrepresentation was not a defense.

Moreover, the Court compounded its already prejudicial error by further confusing the jury and incorrectly stating that there is no deliberate intention to misrepresent, and hence no liability, if one expresses an opinion which is not actually believed. This statement completely nullified the previously given proper instruction on fraudulent misrepresentation and, added to the Court's failure to instruct on innocent misrepresentation, served to make the entire issue one of mass confusion.*

B. Taken as a Whole, the District Court's Instructions to the Jury Were Not Fair and Accurate.

The District Court's prejudicial error was accentuated by the overall content of the instructions to the jury. The charge to the jury contained no fewer than ten references to fraud, fraudulent inducement, intent to deceive, knowledge that statements were false and false representations (903-08A; 916A). Not once did the District Court even vaguely refer to Satra's right to rescind as long as Stern made an untrue statement, without regard to his state of mind (or indeed, even if Stern believed the statement to be true).

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* Stern must have realized the serious error in the District Court's impromptu comment to the jury, for he went to extreme lengths to explain it away. In a footnote on page 27 of his Brief, Stern re-punctuated the District Court's language and actually suggested that certain of the Court's key words simply be omitted from consideration. Such magical manipulation of the English language is truly, to borrow an analogy from Stern, an Alice in Wonderland exercise.

The District Court's charge was not saved, as Stern claims (Stern's Brief, p. 28), by the Court's statement that

> ". . . even if you were to find that Dr. Stern made the misrepresentation without knowing whether it was true or false but *pretending* that he had exact knowledge of the situation when he did not, *you can find that he intended to deceive Satra.*" (Emphasis added.) (907A)

The District Court thus expressly linked the permissible finding with an "intent to deceive." Indeed, as the District Court specifically refused to charge as Satra requested (885-86A; 930A), it is difficult to see how its overall instructions could have unintentionally conveyed a message which it knowingly sought not to convey.*

Nor was the requested instruction redundant, for it clearly *excluded* from consideration one of the elements critical to the defense of fraudulent misrepresentation but unnecessary to the defense of innocent misrepresentation.**

Finally, the District Court's instruction and the jury's verdict on failure of consideration does not "save" the Court's otherwise prejudicial error (Stern's Brief, p. 28). In the context of the phraseology of the jury instruction on

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* Contrary to Stern's innuendo (Stern's Brief, p. 22), Satra did not agree to have the jury instructed only on the issue of fraud. Judge Lasker's summary of issues (834A) followed extensive discussion as to how the issue of damages would be decided and whether the jury would be asked special interrogatories (819-34A). Satra's agreement referred *only* to the District Court's suggested procedure and schedule for the Court trial on damages (834-36A). It in no way can be construed, as Stern would have this Court believe, as an agreement on the elements to be charged concerning the defense of rescission based on misrepresentation.

** Stern's counsel obviously recognized the important distinction between the two defenses when he asked Stern, on direct examination: "Did you convey any impression, *consciously, intentionally,* to any of the Satra people that you knew Ambassador Thompson or knew Mr. Jones?" (Emphasis added.) (179A)

that point (*i.e.*, Did "Satra g[e]t what it bargained for . . ."? [908A]), the jury merely found that Satra sought IBM as a client and that it eventually obtained IBM as a client. The verdict does not address, nor is it dispositive of, the issue of the inducing factors underlying Satra's agreement with Stern.

In view of the failure of the jury instructions as a whole to correct the prejudicial error committed by the Court, the judgment must be reversed.*

C. The Issue of Reliance Does Not Transform the District Court's Prejudicial Error into Harmless Error.

Stern claims that the District Court's error, if error there was, was harmless because Satra did not rely on Stern's misrepresentations, and therefore a proper charge would not have changed the outcome.** Stern, in effect, asks this Court to review the sufficiency of the evidence on the factual issue of reliance and to rule that there should have been a directed verdict below. This argument must fail, for (a) Stern failed to preserve the issue of the sufficiency of the evidence on reliance for review by this Court, and (b) on the merits, there was sufficient evidence on reliance to submit that question to the jury.

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* Contrary to Stern's assertion, a judgment based on a jury's general verdict must be reversed as long as the verdict *may* have resulted from the improper charge. *Simpson Timber Co.* v. *Parks*, 369 F.2d 324, 331 (9th Cir. 1967), *vacated on other grounds*, 388 U.S. 459 (1967); *Western Union Tel. Co.* v. *Lesesne*, 198 F.2d 154, 158 (4th Cir. 1952), *cert. denied*, 344 U.S. 896 (1952); *Pacific Greyhound Lines* v. *Zane*, 160 F.2d 731, 737 (9th Cir. 1947).

** On an apparently related thesis, Stern seems to claim that as his words were opinions and not misrepresentations, they could hardly have been innocent misrepresentations. This begs the question, for the issue of "fact *vs.* opinion" was properly submitted to the jury without objection by either party (904-05A; 917-18A; 932A).

1. Stern Has Failed to Preserve a "Sufficiency of the Evidence" Argument on Appeal.

At the close of Satra's case, Stern's counsel moved for a directed verdict under Rule 50 of the Federal Rules of Civil Procedure ("FRCP") as follows:

> ". . . I would like on behalf of the plaintiff to move to strike the affirmative defenses and counterclaims alleged in the answer and for a directed verdict under Rules 41(c) and 50 of the Federal Rules of Civil Procedure on the ground of insufficiency of law and failure of proof. I needn't recount the evidence because I think Your Honor has a fine grasp of it." (872A).

The District Court denied Stern's motion, stating that "there are serious questions of fact and they must go to the jury." (880A).

Stern's motion for a directed verdict, inadequate under Rule 50(a) for not stating the specific grounds for the relief requested, failed to preserve for review the District Court's determination as to the sufficiency of the evidence. *Massaro* v. *United States Lines Company*, 307 F.2d 299, 303 (3rd Cir. 1962); *Rotondo* v. *Isthmian Steamship Co.*, 243 F.2d 581, 582 (2d Cir. 1957), *cert. denied*, 355 U.S. 834 (1957); *Jones Truck Lines, Inc.* v. *Argo*, 237 F.2d 649, 652 (8th Cir. 1956).*

2. On the Merits, There Was Sufficient Evidence to Send the Issue of Reliance to the Jury.

The District Court below, after observing all of the witnesses and hearing all the evidence (of which plaintiff's counsel felt the Court had a "fine grasp" [872A]), found that "there are serious questions of fact and they must go

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* Stern also waived his right to appeal this point by failing to raise it in his Notice of Cross-Appeal. See Point IV A, *infra*.

to the jury." (880A). This Court should affirm that determination as to the issue of reliance, for the record is replete with evidence from which reasonable men could draw the conclusion or inference that Stern's misrepresentations were one of the factors motivating Satra to give up 50% (less expenses) of potentially millions of dollars of revenues from IBM.* For example, Oztemel himself testified that:

> ". . . [a] part of my understanding and my agreement with him was that he would carry literally fifty percent of the load in servicing the IBM account and, using his own words, I reminded Dr. Stern that he had said without his presence and work that the contract with IBM was never possible.
>
> I told him [Stern] that I had now regretfully found that I was misled and, therefore, regretfully I told him that our relationship as it was had to stop." (723A)

(For other examples of Stern's misrepresentations and Satra's belief therein, the Court is respectfully referred to the record at 455-56A, 461-62A, 554A, 565-66A, 573A, 596-97A, 713-15A and 763-65A.)

Oztemel's testimony relevant to payment of finders' fees, cited by Stern, does not support Stern's argument that as a matter of law, Satra did not rely on Stern's misrepresentations. Satra has never denied that Stern made some contribution to getting IBM as a client (927-30A). The testimony cited by Stern stands for nothing more than the proposition that to Oztemel, *a finder's fee* is not dependent on the reason or method by which the "finder" arranges

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* As correctly charged by the District Court without objection, the jury did not have to find that the misrepresentations were the *only* inducing cause of the agreement. It is sufficient to prove reliance if the misrepresentations were *one* inducing cause. (907A; *State Street Trust Co.* v. *Ernst*, 278 N.Y. 104, 15 N.E.2d 416 (1938)).

the initial introduction, or whether the "finder" has influence within the prospective client.* The testimony is irrelevant when analyzing the factors inducing substantially *more* than a finder's fee, *i.e.*, 50%, to be given away.

In short, reasonable men could certainly have drawn the conclusion or inference that Satra, with its acknowledged expertise in representing American companies in the Soviet Union, relied on Stern's misrepresentations as to (a) his influence within IBM and (b) the necessity of his technical services to a successful Satra-IBM relationship, in giving up 50% of potentially millions of dollars to an individual with absolutely no experience in Soviet-American trade.**

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* Stern has misleadingly attempted to demonstrate that "it was clear to Oztemel . . . that Stern knew no one at IBM and had no long-standing friendship with IBM personnel." (Stern's Brief, p. 24.) However, Oztemel's cited testimony was limited *only* to those individuals of IBM World Trade Corporation with whom he and Stern met in New York, individuals who were *not* in a decision-making capacity as to whether IBM should trade with the Soviet Union (787A). Rather, that power rested in Mr. Watson, Chairman of IBM, one of the very individuals who Stern professed to be able to contact (713-14A).

Stern further misleads the reader of his Brief on this point by conspicuously omitting language necessary to put other cited testimony of Oztemel in context. The full record reads as follows: "*If IBM stood solemnly on the resolution that they are not going to deal in the Soviet Union,* I don't believe Dr. Stern had enough influence there to change their mind." (Emphasis added) (437A). That is a far cry from saying that Satra did not believe or rely on Stern's claim that he had influence to *help* convince IBM to enter the Soviet market or to use Satra as an intermediary.

** Stern also claims Satra's reliance was unreasonable as a matter of law. Aside from Stern's also having waived his right to appellate review of this point, the District Court properly found that this was another question of fact to be submitted to the jury. As the District Court charged without objection, a party has a right to rely on the truth of statements made in the course of business dealings, and the law does not automatically require a party to make his own investigation of those statements (907-08A). Indeed, it is unethical in Satra's business to do so (798A).

POINT II

The District Court Improperly Construed the Stern-Satra Agreement by Finding That Satra Intended to Go Unreimbursed for Substantial Expenses Incurred During Its Equal Partnership Arrangement with Stern.

A. Stern Has Incorrectly Described the Standards Controlling the Determination of This Issue.

Contrary to Stern's assertions, whether the District Court erred by adopting a non-cumulative, *pro rata* approach to the deduction of expenses is not to be governed by (1) the "sufficiency of the evidence" test applicable to jury findings of fact, or (2) the "clearly erroneous" test applicable to court findings of fact. This Court can proceed to determine how the Expense Schedule is to be applied to revenues by making its own construction or interpretation of the Stern-Satra Agreement.

1. The Jury Verdict Did Not Determine the Operation of the Expense Schedule.

Time and time again throughout his Brief, Stern has claimed that the jury verdict has disposed of several of the issues which are now on appeal in his favor, when in truth, the verdict carries no such import. Like the Big Lie, Stern hopes that sufficient repetition will cause it to be believed. Stern argued below that the jury's general verdict constituted a finding for him on the operation of the Expense Schedule. This position was rightfully rejected by the District Court:

> "The verdict could just as well mean that the jury found either a) that the terms of the Schedule were not a material part of the contract [and hence that there was no meeting of the minds on that issue], or b) that *Satra's* construction of the application of the Schedule was correct. Stern's contention that the issue

was foreclosed by the jury verdict must therefore be rejected." (Emphasis in original.) (35A)

Stern did not appeal this finding (Notice of Cross-Appeal), yet he argues on four different occasions in Point II of his Brief that the jury verdict is binding as to the application of the Expense Schedule. Stern should not be permitted to cloak himself with the protection of a non-dispositive jury verdict.

2. *This Court Is Free of the "Clearly Erroneous" Test in Reviewing the Construction of the Stern-Satra Agreement.*

The construction of a contract, involving questions of law and mixed questions of law and fact, is *not* a finding of fact within the meaning of Rule 52 of the FRCP. An appellate court is therefore not burdened by the "clearly erroneous" test as set forth in that Rule when reviewing a lower court's construction of a contract. *Stamicarbon, N.V.* v. *American Cyanamid Company,* 506 F.2d 532, 537 (2d Cir. 1974); *University Hills, Inc.* v. *Patton,* 427 F.2d 1094, 1099 (6th Cir. 1970); *Eddy* v. *Prudence Bonds Corporation,* 165 F.2d 157, 163 (2d Cir. 1947). It is therefore proper, and indeed necessary, for this Court to proceed on its own interpretation of the Stern-Satra Agreement.

B. The Findings of the District Court That Expenses Are to Be Deducted on a Non-Cumulative, *Pro Rata* Basis Violate Both the Language and a Reasonable Construction of the Written Agreement.

Stern, apparently recognizing that the language of a written contract is controlling, claims the District Court did not ignore the pertinent language of the Stern-Satra Agreement and "took into consideration all its parts" (Stern's Brief, p. 33). Stern does not, and cannot, refer

to anything in the District Court's opinion which supports his conclusion, for not once did the District Court discuss the language of the agreement in construing its terms. (*See* Main Brief, pp. 22-24).

Also contrary to Stern's assertions, the District Court did not make any finding as to the reasonableness of its construction of the Stern-Satra Agreement, nor is Satra asking this Court to redraft the contract on the grounds of "reasonableness."* Satra claims only that the element of reasonableness is relevant in determining the parties' *original* intent (Main Brief, pp. 27-30). This Court should consider whether it is reasonable to expect that a party entering into an agreement designed to provide for its reimbursement of expenses would intentionally relinquish such reimbursement during all years in which no revenues were received, particularly when it fully expected that revenues would *not* be received for several years (472A; 706A). If the Court finds this result to be unreasonable, it should reverse the District Court's findings and hold that expenses are to be deducted on a cumulative, off-the-top basis.**

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* This is similar to Stern's misuse of Hanno Mott's testimony on page 19 of his Brief. It is absolutely false that on September 3, 1971, Mott acknowledged he was trying to change the terms of the Stern-Satra Agreement in a manner that would be more reasonable, and Mott's cited testimony is completely to the contrary (482-83A).

** Satra utilized Exhibit 3 (E100-03) at trial to prove its actual expenses incurred in servicing the 1971 IBM agreement and to demonstrate the unreasonableness of the construction ultimately adopted by the District Court (a construction which shall require Satra to go unreimbursed for $400,000 expended over two years in servicing the IBM account). After Stern's objection to the exhibit on the grounds of relevancy and materiality, it was agreed by all to defer consideration of actual expenses subject to Satra's proffer on that point and its right to produce further evidence at a later time if the District Court so desired (973-79A). Contrary to Stern's assertion, there never was a ruling that Satra was unable to prove its actual, unreimbursed expenses, or that the figures on Exhibit 3 did not accurately represent such expenses. And as the District Court did not request further information on the subject, the conclusion to be drawn is that it did not test the reasonableness of its construction in the light of reality.

POINT III

Stern Has Not Successfully Demonstrated That the 1973 IBM Agreement Is a Renewal of the 1971 IBM Agreement.

Stern has once again incorrectly identified the "clearly erroneous" test as the applicable standard governing this Court's review of whether the 1973 IBM Agreement is a renewal of the 1971 IBM Agreement. As Satra claims that improper legal standards were utilized by the District Court in determining this question, the Court of Appeals is not bound by the "clearly erroneous" test in reviewing the District Court's action. Main Brief, pp. 31-39; *Mamiye Bros.* v. *Barber Steamship Lines, Inc.*, 360 F.2d 774 (2d Cir. 1966), *cert. denied*, 385 U.S. 835 (1966).

Having disposed of this preliminary matter, Satra need only point out that Stern, by not confining himself to the terms of the two IBM agreements and by referring to evidence outside those agreements, has fallen into the same trap and has made the same errors of law as did the District Court in discussing whether the 1973 IBM Agreement was a renewal of the 1971 IBM Agreement. In fact, Stern's two-page treatment of this entire issue (Stern's Brief, pp. 37-38) is little more than a rehash of the District Court's statements.* As demonstrated by Satra's Main Brief (pp. 31-39), the District Court's findings on this point should be reversed.

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* Stern, in essence, defends the District Court's "general purpose" test and simply claims that the cases cited by Satra to the contrary are "inapposite" as relating only to real estate brokers and to statutory rent-controlled leases. Stern's first distinction is factually incorrect (*see, In re Hecht's Estate*, 138 Misc. 378, 245 N.Y.S. 629 [Surr. Ct. N.Y. Co. 1930]); the second cannot be gleaned from the cases, and neither successfully distinguishes the cited cases from the case at bar.

POINT IV

The District Court Was Correct in Finding That the Stern-Satra Agreement Required the Deduction of Expenses from All Payments Made Under the 1973 IBM Agreement.*

As part of his cross-appeal, Stern argues that the District Court erred in finding he is entitled to one-half of the $9,350 and $16,667 monthly payments Satra receives under the 1973 IBM Agreement *after* the deduction of expenses according to the Expense Schedule. He bases his claim on the provision of the Stern-Satra Agreement that

> "In alternate one (I) any retainers received will be divided 50-50. Other income as above schedule." (E9),

and claims that the intention of the parties was to include both the $9,350 and $16,667 payments within the scope of that clause. Stern is saying, in effect, that while Satra shall go forever unreimbursed for its expenses (for the 1973 IBM Agreement provides for no other specific revenue than the payments of $9,350 and $16,667), Stern will make as pure profit one-half of all incoming sums. The absurdity of this contention was rightly rejected by the District Court, and its findings should be affirmed.

A. Stern Has Waived His Right to Claim One-Half of the $16,667 Monthly Payments Free of Expenses.

This Court is precluded from reviewing whether expenses are to be deducted from the $16,667 payments because of Stern's failure to specify that issue in both his

* Stern has even misleadingly phrased the issue under consideration in the heading to Point IV of his Brief. The District Court did not treat retainers or advances against commissions differently under the 1971 and 1973 IBM Agreements. Rather, it held that payments made under the latter agreement did not constitute retainers within the meaning of the "retainer clause" at the foot of the Expense Schedule.

Notice of Cross-Appeal and the Civil Appeal Pre-Argument Statement filed by Stern pursuant to this Court's Civil Appeals Management Plan. The deduction of expenses from the monthly payments of $9,350 and $16,667 were briefed below by the parties as distinct issues, were treated separately in oral argument before the District Court, and were decided as distinct issues by Judge Lasker (44-45A). Under these circumstances, where parts of a judgment are truly independent and one part has been omitted from a notice of appeal, this Court lacks jurisdiction to review the omitted issue. *Terkildsen* v. *Waters*, 481 F.2d 201, 205-06 (2d Cir. 1973); *Benenson* v. *United States*, 385 F.2d 26, 29 (2d Cir. 1967).

B. The Purpose of the "Retainer Clause" at the Foot of the Expense Schedule

There is no dispute that when Satra and Stern executed their agreement, neither contemplated an arrangement with IBM as reflected by the 1973 IBM Agreement. Further, the language of the Stern-Satra Agreement is silent as to the definition of the word "retainer" at the foot of the Expense Schedule or the parties' intention in their use of that word. It therefore becomes essential to examine the circumstances surrounding the insertion of the handwritten "retainer clause," and the nature of the $9,350 and $16,667 monthly payments specified in the 1973 IBM Agreement.

After reviewing all the evidence, Judge Lasker found that Stern's need for immediate income gave rise to the "retainer clause," and that such clause was to apply only to an *immediate*, cash-on-the-barrelhead payment from IBM and not to periodic, on-going payments. As the $9,350 and $16,667 payments were periodic payments for commissions and services rendered, the District Court found that they were *not* retainers within the meaning of the "retainer

clause," and therefore were subject to deduction for expenses prior to their distribution to Stern. These findings are fully supported by the record, and should be affirmed (42-44A; *see also*, 121A; 135-41A; 154-59A; 320A; and 708A for evidence as to Stern's need for immediate current income, a need which gave rise to the "retainer clause"*).

On several occasions, Stern's Brief attributed the words "recurring" and "on-going" to both himself and Oztemel to demonstrate that the "retainer clause" was to apply to more than just an immediate payment (*e.g.*, Stern's Brief, pp. 41-42). A detailed search of the record has not disclosed one instance where the parties used either of those phrases in discussing the "retainer clause."**

But even if they did, that is not dispositive of the issue. The key consideration, proven by Stern's own testimony (158-59A), is that Stern and Oztemel premised the insertion of the "retainer clause" (allowing Stern to obtain a full 50% of *current* income free of expenses) entirely upon there being *future* commission income from which Satra could be reimbursed for expenses. The clause was never intended to apply to actual commission payments, or to payments for services rendered when there was no other source of future commission income against which the Expense Schedule would apply.

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* Stern's suggestion and then insistence on the "retainer clause" finally allowed Stern to achieve what he had wanted all along—the 50-50 arrangement so as to maximize his potential profit—but had been unable to obtain because of his inability to finance himself (121A; 140A; 167A). Stern's claim that he was "pushed" into accepting the offer is incredible (Stern's Brief, p. 39), particularly in light of his and his wife's conscious decision, after long discussion, to take the higher risk offer (167A).

** One of Stern's more egregious misstatements of the record appears on page 42 of his Brief concerning this subject. The record discloses Oztemel stated only that as opposed to current income, "the reimbursement schedule really is logically associated with expenses on sales and future commission." (159A). The concluding phrase "not current, on-going payments," a verbatim quote attributed directly to Oztemel by Stern in his Brief, simply does not appear in the record.

C. Expenses Should Be Deducted from the $9,350 Monthly Payments Prior to Distribution to Stern.

Stern claims he is entitled to one-half of the $9,350 payments free of expenses because they are retainers within the meaning of the "retainer clause." Since the $9,350 payments are on-going payments, and since, as the District Court properly held, the "retainer clause" was to apply only to an *immediate*, cash-on-the-barrelhead payment, Stern's claim must fail.

The same result must be reached even if the Court finds that the parties intended the "retainer clause" to apply to periodic payments of current income, and regardless of the method by which the $25,000 payments under the 1971 IBM Agreement were distributed to Stern.* The $9,350 payments represent Satra's *actual* 3½% commission on the Intourist computer sale negotiated by IBM during the term of the 1971 IBM Agreement (calculated by dividing the total commission due by the number of months in the 1973 IBM Agreement) (990-92A; E41). The payments were not arbitrarily derived figures unassociated with specific sales, as were the $25,000 payments. Further, unlike the $25,000 payments, the $9,350 payments are not to be used to reduce any future moneys owed by IBM to Satra. In short, they are exactly the type of *future commission income* earned under the 1971 IBM Agreement, as opposed to current income, to which Satra and Stern both contemplated the Expense Schedule would apply. Any other result is tantamount to stating that Satra intended not to be reimbursed for practically all of the $400,000 actually incurred (E100-

* Satra's agreement to Stern's demand that he receive one-half of the first $25,000 payment under the 1971 IBM Agreement free of expenses was made in the context of nominal amounts being paid by IBM to cement its relationship with Satra (219-23A). It in no way can be construed as a binding agreement to divide *all* advances against commissions, nominal or otherwise, without deducting expenses.

01), or the $200,000 contemplated to be incurred (469-72A), in servicing the 1971 IBM Agreement.

D. Expenses Should Be Deducted from the $16,667 Monthly Payments Prior to Distribution to Stern.

Stern's claim to one-half of the $16,667 payments expense-free must also fail. As described previously, and as found by the District Court, the "retainer clause" was intended to apply solely to a one-time retainer payment and not to periodic payments for services rendered. Hence, the clause cannot be used to deprive Satra of its reimbursement of expenses from the $16,667 payments.

Even if the "retainer clause" *were* to apply to certain periodic payments, it was never intended to apply to payments made for express services rendered *when there was no other source of future commission income against which to make deductions for expenses.* This is the precise situation under the 1973 IBM Agreement. To hold that the $16,667 payments are to be distributed expense-free is to hold that Satra will never be reimbursed for the expenses incurred to service the 3¼ year period of the 1973 IBM Agreement, a result obviously not intended by the parties at the time.

POINT V

The District Court Properly Held That Mitigation of Damages Is Applicable to This Action, and Satra Has Sustained Its Burden of Proof on That Issue.

Stern, arguing that he had to devote little if any time in performing under the Stern-Satra Agreement, claims that the District Court erred in holding that (a) the theory of mitigation of damages is applicable to this case, and (b) Satra has sustained its burden of proof on the factual elements required to be shown in connection with the theory

of mitigation. As described below, Judge Lasker's findings were correct and should be affirmed.

A. Under New York Law, Mitigation of Damages Is an Appropriate Theory to Be Applied to This Case.

The District Court properly held that under New York law, an individual discharged from employment has a duty not to remain idle and must seek new employment upon notice of breach. Monies earned through such new employment will then be applied to reduce damages arising from the alleged breach. *Cornell* v. *T. V. Development Corp.*, 17 N.Y.2d 69, 268 N.Y.S.2d 29 (1966); *Quinn* v. *Straus Broadcasting Group, Inc.*, 309 F. Supp. 1208, 1209 (S.D.N.Y. 1970); *Howard* v. *Daly*, 61 N.Y. 362 (1875).

The District Court also properly held that mitigation of damages is equally applicable to part-time as well as full-time employment situations, with the determinative factual inquiry being the extent to which the discharged employee is able to earn income as a result of the breach. 47A; *Farmers' Fertilizer Co.* v. *Lillie*, 18 F.2d 197 (6th Cir. 1927); *see also*, §336 of the Restatement of Contracts, Comment a. Any other holding would produce the anomalous result of requiring mitigation where an individual must devote 100% of his time to a given project, but not where he is to devote 50% or even 90% of his time to that project.

In *Grinnell Co.* v. *Voorhees*, 1 F.2d 693 (3rd Cir. 1924), *cert. denied*, 266 U.S. 629 (1924) (cited by Stern as controlling this issue), the Court rejected the theory of mitigation as *applied to a manufacturing contract*. However, in language understandably omitted from Stern's Brief, the Court also said as follows:

> "In contracts for personal services the rule [of mitigation] . . . is applicable. In such contracts, it is

> the duty of the plaintiff to use every reasonable effort and proper opportunity to secure another contract in order to mitigate the damages caused by the breach because the plaintiff's services are in his possession. They are his own and he can dispose of them as he pleases." *Id.* at 694.

In *Weisberg* v. *The Art Work Shop*, 226 App. Div. 532, 235 N.Y.S. 8 (1st Dept. 1929), *aff'd*, 252 N.Y. 572 (1929), the Court, *although recognizing that mitigation of damages does apply to employment contracts*, refused to apply it to the unique facts of that case. Quoting 3 Williston, Contracts, §1363, the Court posed the determinative test as follows:

> "If the work is done according to the contract, or if, though not completed, *there is no saving to the contractor by being relieved from finishing it*, the contractor is entitled to recover the contract price." (Emphasis added) *Id.* at 534, 235 N.Y.S. at 10.

It is implicit that if an individual *does* obtain a "saving" by being relieved of performing a contract, mitigation is to apply.*

In short, mitigation of damages is clearly a theory of law applicable to the present action. Its practical application is dependent on certain factual questions on which Satra has fully satisfied its burden of proof.

B. The Facts of Record Require Mitigation to Be Applied in This Case, and Satra Has Met Its Burden of Proof.

Stern claims that he had to devote little, if any, time to performing his obligations under the Stern-Satra Agreement, and that his opportunities to work for other clients

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* *Ritz* v. *Music, Incorporated*, 150 A.2d 160 (1959), also cited by plaintiff, posed the determinative question in much the same fashion: "Did the motel business interfere with [the] music business?" 150 A.2d at 162. Finally, *Carlisle* v. *Barnes*, 102 App.Div. 573, 92 N.Y.S. 917 (1st Dept. 1905), did not even address the question of mitigation.

were therefore no greater after Satra's breach than they were before. This position provides the final link in Stern's chain of absurdity and overreaching, since it means, in essence, that Stern was to receive 50% of potentially millions of dollars, in return for which he was to provide little or no time in servicing Satra's agreement with IBM. Judge Lasker rightfully rejected Stern's theory as simplistic, and made a finding of fact that there were significant services which Stern was to perform in connection with the Satra-IBM agreement (47-48A).*

Satra has already set forth its factual view that Stern was to have spent all or substantially all of his time performing under the Stern-Satra Agreement, and this Court is respectfully referred to pages 42-46 of Satra's Main Brief for that discussion. Suffice it to say that Stern, (a) expecting to spend significant time away from his home in Los Angeles commuting to New York and the Soviet Union (211A; 320A; 363A; 396A; 423A), (b) desirous of two assistants to help perform his functions (712A), (c) expected by Satra to carry 50% of the load in servicing the IBM deal for Stern's 50% of the revenue (723A), and (d) most importantly, needing "current income in order to be able to live" because of an obvious inability to simultaneously work for other employers (121A; 157-59A), was committed to expending substantial amounts of time in performing his agreement.

Stern has futilely attempted to support his argument that he was to do practically nothing under the Stern-

* Although interpreting the New York rules of mitigation involves questions of law, Judge Lasker's finding that Stern was to perform significant services in connection with the Satra-IBM agreement is a finding of fact which must not be set aside unless "clearly erroneous." Satra, as part of its own appeal, contends that the District Court's use of a 15% mitigation factor was clearly erroneous and should be adjusted significantly upward (Main Brief, Point V); Stern in effect also contends the finding was clearly erroneous but should be adjusted to zero.

Satra Agreement by mischaracterizing portions of the record. Typical of Stern's technique of omitting key words from cited testimony, the statement attributed to Oztemel (Stern's Brief, p. 50), that "there was no performance required" should have read "there was no performance required *at the time*" (emphasis added), the last three words relating to the reference point of "late 1971" which formed the basis for the question to which the answer was given (771A). And although Stern claims it was *for him* to decide what to do under the Stern-Satra Agreement (Stern's Brief, p. 50), he is refuted by his testimony cited on the very preceding page of his own Brief: "I was to exercise my initiative to assist *wherever called upon* . . ." (emphasis added) (Stern's Brief, p. 49).*

Nor did the professional nature of Stern's services provide him, as he claims, with the flexibility to take on as much work as he desired. Stern, in effect, was a sole practitioner with obvious physical limitations on the work he could perform.

Stern has gone completely outside the record by claiming Satra's breach, rather than providing increased employment opportunities, cut him off from his Russian contacts and the consulting business. Totally contradictory evidence was presented at trial. Stern testified that since 1971 "I have advised some firms as to what I consider to be a potential market area for them in the Soviets and there are two particular firms I have gone over to Moscow with." (1071A). Stern, *who had no experience in commercial transactions with Russia prior to becoming involved with Satra* (259A; 261A; 1075A), earned $15,000 for one week's work for one of the two firms he represented in Moscow

* See also Exhibit Z (E53), where Stern, reacting to language describing part of his role in the Satra-Stern-IBM relationship, boldly wrote in the margin "Pure Joint Venture, not finder!".

(1071A). It seems that Stern should be paying Satra for introducing him into this lucrative area.

In addition to having proven Stern's increased opportunity for employment, Satra has also met its burden of proving the monetary amounts to be considered in applying the theory of mitigation. In *Cornell* v. *T.V. Development Corp., supra*, the New York Court of Appeals remitted the action for a new trial solely to give defendant the opportunity of satisfying his burden of proof on the issues of mitigation. That burden would be fulfilled, according to the Court, by evidence of plaintiff's actual and prospective earnings subsequent to the breach. *Id.* at 76, 268 N.Y.S.2d at 34. That is exactly the type of evidence which Satra adduced both during the trial and at the hearing on damages separately held before the District Court (255-58A; 288A; 1070-78A).* Therefore, this Court should affirm the application of mitigation to this action, but should remand to the District Court for computation of damages in accordance with a finding that Stern was to have spent all or substantially all of his time performing his obligations under the Stern-Satra Agreement.

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* As the hearing on damages was conducted in April 1974, Satra was obviously unable to adduce evidence on Stern's income for 1974, 1975 or 1976, or his attempts to obtain employment during those years. Such evidence is clearly relevant to mitigation of damages if the 1973 IBM Agreement is held to be a renewal of the 1971 IBM Agreement. Satra sought the right to have annual discovery of Stern on those subjects. Stern opposed that request (Memorandum in Response to Plaintiff's Proposed Judgment and in Further Support of Defendants' Proposed Judgment, pp. 7-9), and the District Court ruled, with minor modification, in Stern's favor (69-71A). Stern should not now be permitted to claim that Satra has failed on its burden of proof.

Conclusion

For the reasons stated herein and in its Main Brief, Satra respectfully requests this Court to

(a) reverse the Judgment herein and to remand this action for a new trial; or

(b) in the absence of such relief, reverse the Judgment and remand this action to the District Court for computation of damages consistent with the following rulings requested by Satra:

(i) that expenses are to be deducted on a cumulative, off-the-top basis,

(ii) that the 1973 IBM Agreement is not a renewal of the 1971 IBM Agreement, and

(iii) that mitigation of damages should be applied on the basis that Stern was to have spent all or substantially all of his time performing his obligations under the Stern-Satra Agreement;

(c) affirm the District Court's rulings that the Expense Schedule is to apply to the $9,350 and $16,667 monthly payments prior to distribution to Stern; and

(d) grant Satra such other and further relief as to the Court seems just and proper, including its costs and disbursements in this appeal.

Respectfully submitted,

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Dated: New York, New York
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